



**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID HARINGTON,

Plaintiff,

vs.

BRUCE BANISTER, *et al.*,

Defendants.

3:08-cv-0658-BES-VPC

ORDER

Plaintiff is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. The Court has screened the complaint pursuant to 28 U.S.C. § 1915A and finds that it must be dismissed.

I. Screening Standard

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person

1 acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

2 In addition to the screening requirements under § 1915A, pursuant to the Prison
3 Litigation Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the
4 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim
5 on which relief may be granted, or seeks monetary relief against a defendant who is immune
6 from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim
7 upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6),
8 and the Court applies the same standard under § 1915 when reviewing the adequacy of a
9 complaint or an amended complaint. When a court dismisses a complaint under § 1915(e),
10 the plaintiff should be given leave to amend the complaint with directions as to curing its
11 deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be
12 cured by amendment. See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel*
14 *v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
15 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support
16 of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759
17 (9th Cir. 1999). In making this determination, the Court takes as true all allegations of material
18 fact stated in the complaint, and the Court construes them in the light most favorable to the
19 plaintiff. See *Warshaw v Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a pro
20 se complainant are held to less stringent standards than formal pleadings drafted by lawyers.
21 See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per
22 curiam). While the standard under Rule 12(b)(6) does not require detailed factual allegations,
23 a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
24 *Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the

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1 elements of a cause of action is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286
2 (1986).

3 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if
4 the prisoner's claims lack an arguable basis either in law or in fact. This includes claims based
5 on legal conclusions that are untenable (e.g., claims against defendants who are immune from
6 suit or claims of infringement of a legal interest which clearly does not exist), as well as claims
7 based on fanciful factual allegations (e.g., fantastic or delusional scenarios). See *Neitzke v.*
8 *Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th
9 Cir. 1991).

10 **II. The Instant Complaint**

11 Plaintiff alleges that his Eighth and Fourteenth Amendment rights have been violated
12 because prison medical staff diagnosed him with a hernia in October 2005 and he has been
13 denied three times for surgery. Plaintiff sues Bruce Banister, Karen Gedney, Dr. Johns, and
14 Dr. Snyder in both their individual and official capacities. Plaintiff seeks a court order to
15 require the surgery to be performed as well as declaratory relief.

16 **A. Statute of Limitations**

17 Because 42 U.S.C. § 1983 does not have its own statute of limitations, a court uses the
18 statute of limitations for personal injury actions of the State in which it is located. *Wilson v.*
19 *Garcia*, 471 U.S. 261 (1985). In Nevada, the applicable statute of limitations is Nev. Rev. Stat.
20 § 11.190(4)(e), which has a period of limitations of two (2) years. *Perez v. Seevers*, 869 F.2d
21 425, 426 (9th Cir. 1989). "Federal law determines when a cause of action accrues and the
22 statute of limitations begins to run for a § 1983 claim. A federal claim accrues when the
23 plaintiff knows or has reason to know of the injury which is the basis of the action." *Bagley v.*
24 *CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992)
25 (citations and internal quotations omitted).

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1 Plaintiff indicates on page 1 of his complaint that the approximate dates of his claims
2 are 10/6/05, 10/17/05, 11/1/05, and 9/11/06. In describing the nature of his case, he states
3 that he was diagnosed on October 17, 2005 as having an inguinal hernia. He was then
4 subsequently denied surgery several times to treat that hernia. The documentation that
5 Plaintiff provided to support his claims are all dated in 2005 and 2006. Plaintiff filed his
6 complaint on December 12, 2008. It appears, therefore, that Plaintiff's claim is barred by the
7 two-year statute of limitations in Nevada.

8 **B. Medical Treatment**

9 Even if Plaintiff's claim is not time-barred, it is still not actionable. A prisoner's claim of
10 inadequate medical care does not constitute cruel and unusual punishment unless the
11 mistreatment rises to the level of "deliberate indifference to serious medical needs." *Estelle*
12 *v. Gamble*, 429 U.S. 97, 106 (1976). The "deliberate indifference" standard involves an
13 objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
14 "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*,
15 501 U.S. 294, 298 (1991)). Second, the prison official must act with a "sufficiently culpable
16 state of mind," which entails more than mere negligence, but less than conduct undertaken
17 for the very purpose of causing harm. *Farmer v. Brennan*, 511 U.S. at 837. A prison official
18 does not act in a deliberately indifferent manner unless the official "knows of and disregards
19 an excessive risk to inmate health or safety." *Id.*

20 In applying this standard, the Ninth Circuit has held that before it can be said that a
21 prisoner's civil rights have been abridged, "the indifference to his medical needs must be
22 substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this
23 cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), *citing*
24 *Estelle*, 429 U.S. at 105-06. "[A] complaint that a physician has been negligent in diagnosing
25 or treating a medical condition does not state a valid claim of medical mistreatment under the
26 Eighth Amendment. Medical malpractice does not become a constitutional violation merely

1 because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. at 106; *see also Anderson v.*
2 *County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v. Smith*, 974 F.2d 1050, 1050
3 (9th Cir. 1992), *overruled on other grounds, WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136
4 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish deliberate
5 indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th
6 Cir. 1990). A prisoner's mere disagreement with diagnosis or treatment does not support a
7 claim of deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

8 Here, prison medical officials have indicated that surgery is not required to treat the
9 plaintiff's condition and that not all hernias are medically necessary for surgical repair.
10 Plaintiff's mere disagreement with that treatment plan does not state a claim for deliberate
11 indifference and therefore is not actionable. Thus, the plaintiff's claim must be dismissed.

12 Accordingly, and with good cause appearing,

13 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint.

14 **IT IS FURTHER ORDERED** that this action is **DISMISSED with prejudice for failure**
15 **to state a claim upon which relief can be granted.**

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall **CLOSE THIS CASE** and
17 **ENTER JUDGMENT ACCORDINGLY.**

18 DATED: This 2nd day of July, 2009.

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21 UNITED STATES DISTRICT JUDGE
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